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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 ANNETTE S. GOULEY,

Civil No. 05-6091-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15 _____
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25 AIKEN, Judge:

26 Claimant, Annette Gouley, brings this action pursuant to
27 the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain
28

1 judicial review of a final decision of the Commissioner. The
2 Commissioner denied plaintiff's application for Disability
3 Insurance Benefits (DIB) under Title II of the Social Security
4 Act. Id. For the reasons set forth below, the defendant's
5 motion to remand is denied, and the Commissioner's decision is
6 reversed and remanded for payment of benefits.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff protectively filed her application for DIB on
9 January 31, 2003, alleging disability as of July 2, 2002. Tr.
10 59. Her application was denied initially, and upon
11 reconsideration. On August 10, 2004, a hearing was held before
12 an Administrative Law Judge (ALJ). Tr. 454-473. On November
13 22, 2004, the ALJ ruled that plaintiff was not disabled. Tr. 16-
14 25. The Appeals Council denied plaintiff's request for review,
15 tr. 5-7, making the ALJ's decision the final agency decision.
16 See 20 C.F.R. §§ 404.981, 416.1481.

17 **STATEMENT OF THE FACTS**

18 At the time of the ALJ's decision, plaintiff was forty-one
19 years old. Tr. 25. She obtained a general equivalency diploma
20 (GED). Tr. 91. Plaintiff has past relevant work experience as a
21 grocery store clerk. Tr. 469.

22 **STANDARD OF REVIEW**

23 This court must affirm the Secretary's decision if it is
24 based on proper legal standards and the findings are supported by
25 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
26 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
27 mere scintilla. It means such relevant evidence as a reasonable
28 mind might accept as adequate to support a conclusion."

1 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
2 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
3 The court must weigh "both the evidence that supports and
4 detracts from the Secretary's conclusions." Martinez v. Heckler,
5 807 F.2d 771, 772 (9th Cir. 1986).

6 The initial burden of proof rests upon the claimant to
7 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
8 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
9 an "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental
11 impairment which can be expected . . . to last for a continuous
12 period of not less than 12 months. . . ." 42 U.S.C.
13 § 423(d)(1)(A).

14 The Secretary has established a five-step sequential
15 process for determining whether a person is disabled. Bowen v.
16 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
17 416.920. First the Secretary determines whether a claimant is
18 engaged in "substantial gainful activity." If so, the claimant
19 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
20 §§ 404.1520(b), 416.920(b).

21 In step two the Secretary determines whether the claimant
22 has a "medically severe impairment or combination of
23 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
24 §§ 404.1520(c), 416.920(c). If not, the claimant is not
25 disabled.

26 In step three the Secretary determines whether the
27 impairment meets or equals "one of a number of listed impairments
28 that the Secretary acknowledges are so severe as to preclude

1 substantial gainful activity." Id.; see 20 C.F.R.
2 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
3 presumed disabled; if not, the Secretary proceeds to step four.
4 Yuckert, 482 U.S. at 141.

5 In step four the Secretary determines whether the claimant
6 can still perform "past relevant work." 20 C.F.R.
7 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
8 disabled. If she cannot perform past relevant work, the burden
9 shifts to the Secretary. In step five, the Secretary must
10 establish that the claimant can perform other work. Yuckert, 482
11 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
12 (f). If the Secretary meets this burden and proves that the
13 claimant is able to perform other work which exists in the
14 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
15 416.966.

16 DISCUSSION

17 At Step One, the ALJ found that plaintiff had not engaged
18 in substantial gainful activity since her alleged onset date.
19 Tr. 17, 24, Finding 2. See 20 C.F.R. § 404.1520(b). This
20 finding is not in dispute. At Step Two, the ALJ found that
21 plaintiff had the following severe impairments: migraines,
22 residual effects of fusion at C4-5 and C6-7, and L5-S1 disc
23 disease. Tr. 17, 24, Finding 3. See 20 C.F.R. § 404.1520(c).
24 This finding is not in dispute. At Step Three, the ALJ found
25 that plaintiff's impairments did not meet or equal the
26 requirements of a listed impairment. Tr. 17, 24, Finding 3. See
27 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d). This finding is
28 not in dispute.

1 The ALJ next determined that plaintiff had the residual
2 functional capacity to perform a reduced range of light work.
3 Tr. 22-24, Finding 5. See 20 C.F.R. § 404.1567. This finding is
4 in dispute. At Step Four, the ALJ found that plaintiff was not
5 able to perform her past relevant work. Tr. 23-24, Finding 6.
6 See 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f). This finding
7 is not in dispute. Finally, at Step Five, the ALJ found that
8 plaintiff could perform other work existing in significant
9 numbers in the national economy. Tr. 23-25, Findings 8-12. See
10 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g). This finding is in
11 dispute.

12 Plaintiff alleges the ALJ erred when he failed to consider
13 a Physical Residual Functional Capacity Questionnaire that was
14 completed by plaintiff's physical therapist (PT) John Breuer on
15 September 9, 2004, and submitted to the ALJ on September 13,
16 2004. Tr. 446-51. The defendant concedes that the ALJ failed to
17 consider John Breuer's report and argues that this case should be
18 remanded to allow the ALJ to evaluate Breuer's report.

19 Although PT Breuer is not an "acceptable medical source,"
20 the ALJ was required to consider this evidence and provide a
21 reason germane to PT Breuer in order to disregard his opinion.
22 Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993). Although
23 lay testimony cannot establish disability on its own, pursuant to
24 the regulations, the ALJ must consider this testimony. Nguyen v.
25 Chater, 100 F.3d 1462, 1467 (9th Cir. 1996).

26 PT Breuer opined that plaintiff could lift twenty pounds
27 rarely and ten pounds occasionally. Tr. 449. Further, plaintiff
28 could sit for two hours in an eight hour day and stand/walk for

1 two hours in an eight hour day. Id. PT Breuer stated plaintiff
2 would need to change position at will and could sit for thirty
3 minutes at a time and stand for thirty minutes at a time. Tr.
4 448-49. Plaintiff would also need to include periods of walking
5 every fifteen minutes. Tr. 449. PT Breuer found plaintiff
6 rarely able to look down, look up, hold her head in a static
7 position, twist, stoop, crouch, and climb ladders. Tr. 450.
8 Breuer wrote that plaintiff could occasionally turn her head
9 right or left and climb stairs. Id. Additionally, PT Breuer
10 found that plaintiff, in a eight-hour work day, could use her
11 hands to grasp objects 50% of the day, use her fingers for fine
12 manipulations 80% of the day, and reach her arms overhead 10-20%
13 of the day. Id. Due to plaintiff's physical problems, Breuer
14 stated that plaintiff would be absent from work more than four
15 days per month. Id. Further, due to pain symptoms, Breuer
16 indicated plaintiff would have frequent lapses of concentration
17 that would interfere with even simple tasks throughout an eight
18 hour work day. Tr. 448.

19 In further support of plaintiff's disability, plaintiff
20 points to her migraine headaches which the ALJ found to be
21 "severe." Tr. 17. The ALJ's residual functional capacity,
22 however, failed to include any limitations related to migraine
23 headaches. Tr. 22-23. Plaintiff's physicians concluded that
24 plaintiff's migraines were related to plaintiff's neck
25 impairment. Tr. 297-98, 323-24, 432-33. Plaintiff testified
26 that she had migraine headaches approximately two to three times
27 a week requiring her to lay down. Tr. 464. Plaintiff reported
28 to her physician that the headaches normally lasted a few hours.

1 Tr. 323. Moreover, the headaches resulted in pain, nausea, and
2 vision blurring. Id.

3 If plaintiff had migraines at a frequency of two to three
4 times per week resulting in missed work for two hours per
5 episode, the total amount of work missed per month would meet or
6 exceed two days. The vocational expert testified that if a
7 person missed more than one day per month, that person would not
8 be able to maintain employment. Tr. 472.

9 Plaintiff next asserts that the ALJ's rejection of her
10 credibility was in error. In rejecting a plaintiff's testimony,
11 the Commissioner must perform a two-stage analysis. Smolen v.
12 Chater, 80 F.3d 1273, 1281 (9th Cir. 1996). First, a plaintiff
13 must produce objective medical evidence of an underlying
14 impairment which could reasonably be expected to produce the pain
15 or other symptoms alleged. In addition, there must be no
16 evidence of malingering. Plaintiff has produced objective
17 evidence of an impairment that could produce some symptoms
18 resulting in limitation of her physical capacity. Further, the
19 ALJ found no evidence of malingering. Therefore, the analysis
20 moves to the second stage, a credibility determination.

21 Under the second part of the analysis, the Commissioner
22 must analyze the credibility of a plaintiff's testimony regarding
23 the severity of her symptoms. The Commissioner can reject a
24 plaintiff's symptom testimony only if she makes specific
25 findings, stating clear and convincing reasons for doing so.
26 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

27 The ALJ discredited plaintiff's testimony because
28 plaintiff's statements regarding her upper extremities were not

1 consistent with the medical records. The ALJ stated plaintiff
2 did not have a diagnosed impairment that affected the use of her
3 right arm. Defendant concedes that this finding is inaccurate.
4 Plaintiff was diagnosed with a right shoulder subacromial
5 impingement syndrome with AC joint arthritis and rotator cuff
6 arthropathy. Tr. 225. Plaintiff received two steroid
7 injections. After the second injection, plaintiff indicated the
8 "symptoms had improved to some degree, although they are not
9 completely relieved." Tr. 222.

10 The ALJ also found that plaintiff's statements regarding
11 numbness in her right and left arms were inconsistent with the
12 medical records. Tr. 22. The ALJ noted that plaintiff did not
13 complain of problems in her upper extremities in August,
14 September, or October 2002, but complained of problems in her
15 upper extremities in March 2003. Id. Therefore, the ALJ found
16 plaintiff's statements regarding her symptoms to be inconsistent.
17 Id. The ALJ, however, failed to note that four months following
18 plaintiff's complaints of numbness of her upper extremities, Dr.
19 Parvin found plaintiff to have right carpal tunnel syndrome. Tr.
20 428-29. Therefore, plaintiff's complaint of numbness in her
21 right arm could be found to have an objective basis. Plaintiff
22 also indicated numbness in her left arm although the record did
23 not indicate how often the left arm symptoms occurred. Tr. 441.
24 Although the record did not contain a specific diagnosis
25 regarding plaintiff's left arm, plaintiff's symptoms would not
26 necessarily be inconsistent with plaintiff's diagnosed non-union
27 of her cervical fusion. Tr. 423. The ALJ did note that Dr.
28 Parvin warned plaintiff that the long-standing numbness would not

1 be relieved by cervical surgery. Tr. 22. Therefore, I find that
2 plaintiff's statements regarding pain and numbness in her upper
3 extremities were not inconsistent with the medical records.

4 The ALJ also found plaintiff's statements regarding her
5 migraines were inconsistent with the medical records.
6 Specifically, the ALJ noted that plaintiff reported to two
7 physicians that acupuncture had diminished migraine pain for four
8 or five days and had "helped a bit." Tr. 22. The ALJ stated,
9 however, that plaintiff told her physical therapist that
10 acupuncture had not been successful. Id.

11 The record reflects, however, that plaintiff told her
12 physical therapist that acupuncture had actually relieved
13 problems with dizziness. Tr. 348. The record does not reflect
14 a statement by plaintiff to her physical therapist whether
15 acupuncture had relieved migraine pain. Id. Plaintiff stated
16 instead that acupuncture had failed to relieve symptoms in her
17 neck and thoracic spine. Id. I find no inconsistency by
18 plaintiff in her statements and complaints about migraines.

19 Finally, the ALJ also discredited plaintiff's testimony
20 because on February 2, 2004, Dr. Kitchel stated plaintiff
21 experienced little relief from conservative treatment, however,
22 Dr. Parvin noted plaintiff was doing well on steroid treatment.
23 Tr. 22. The record does not support discrediting plaintiff's
24 testimony on this basis. On March 2, 2004, Dr. Kitchel noted
25 that plaintiff was being treated conservatively for lower back
26 pain without success and that the next step would be a lumbar
27 discogram. Tr. 439. On March 7, 2004, following her appointment
28 with Dr. Kitchel, plaintiff was given oral steroids for her lower

1 back symptoms. Tr. 412. On April 16, 2004, Dr. Parvin noted
2 that plaintiff responded well to the oral steroids, and steroids
3 would be used in the future if there was a recurrence of her
4 symptoms. Tr. 420. I find no inconsistency in the doctor's
5 statements and therefore no basis to find plaintiff's testimony
6 not credible.

7 **CONCLUSION**

8 The Commissioner's decision is not based on substantial
9 evidence, and is therefore, reversed and remanded for payment of
10 benefits. Defendant's motion to remand (doc. 22) is denied.

11 IT IS SO ORDERED.

12 Dated this 16 day of May 2006.

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16 /s/ Ann Aiken

17 Ann Aiken
18 United States District Judge
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